SUPREME COURT, U. S.
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No. 679

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1968

In The Matter of NATHAN SHAVIN, An Attorney

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Heretofore appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of the Chicago Bar Association, Sitting as Commissioners of the Supreme Court of Illinois under Illinois Revised Statutes c. 110A § 751 (1967).

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STATEMENT OF THE CASE

The statement submitted by the Petitioner is adequate.

THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS DOES NOT VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITING DOUBLE JEOPARDY.

I.

THE PETITIONER WAS NOT TWICE PUT IN JEOPARDY

At the outset we think it important to clearly define the central issue which is presented in the Petition For Writ of Certiorari. It is whether the Double Jeopardy Clause of the Fifth Amendment bars a State disciplinary proceeding against an attorney who has been convicted of the federal crime of income tax evasion. We will therefore not respond to matters in the Petition which are not relevant to this issue such as the length of time the Petitioner was an attorney or his conduct during that time, and other matters essentially extraneous in nature.

Petitioner was convicted of knowingly filing false and fraudulent personal income tax returns for the years 1954 and 1955 in violation of Section 7201 of Title 26 of the United States Code. The conviction was affirmed in 1963. (*United States* v. *Shavin*, 320 F. 2d 308 7th Cir. 1963.) Petitioner served twelve months of an eighteen-month sentence. Disciplinary proceedings were commenced against Nathan Shavin by the Chicago Bar Association in 1964 shortly after the final termination of Mr. Shavin's Federal Court proceedings.

The Board of Managers of the Chicago Bar Association, and its existing Committee on Grievances, are appointed by the Illinois Supreme Court, pursuant to Rule 751 (Ill. Rev. Stat. c. 110A sec. 751 (1967)), to "make investigations . . . concerning practices of attorneys at law which tend to de-

feat the administration of justice or to bring the courts and legal profession into disrepute." This power is invested in the Commissioners as a delegation of the Court's inherent and summary jurisdiction over attorneys practicing at its bar. (*In re Needham*, 364 Ill. 65, 4 N.E. 2d 19 (1936).) On the basis of the Commissioners' findings, following investigation and hearing, Rule 751 further provides that "if action by the Supreme Court of any kind is recommended, (the Commissioners shall) report to the Supreme Court . . . its conclusions of fact and law concerning the Complaint, answer, and proof" which shall be docketed as any other case. Thereupon the Supreme Court exercises its jurisdiction to enter the appropriate judgment. (Appendix I)

In the case at bar Petitioner was convicted of the federal crime of income tax evasion. Such a crime is deemed by the Supreme Court of the State of Illinois to involve moral turpitude. (*In re Needham*, 364 Ill. 65, 4 N.E. 2d 19 (1936); *In re Teitelbaum*, 13 Ill. 2d 586, 150 N.E. 2d 873 (1958); cert. den. 358 U.S. 88 (1958). In *Teitelbaum* the Court said at page 588, 874:

> "Moral turpitude has often been set up as a test. It can be applied in an infinite variety of situations by legislative enactment as well as judicial decision. It is for this reason that it eludes a precise definition which will cover all cases. Without attempting to limit the meaning of the phrase, we think it elementary that fraud or fraudulent conduct on the part of an attorney resulting in his conviction necessarily carries the connotation of moral turpitude."

The Illinois Supreme Court has long held that in disciplinary cases based upon the conviction of a crime involving moral turpitude, proof of such conviction is conclusive evidence of guilt and *per se* justifies disciplinary action. (*In re Sullivan*, 33 Ill. 2d 548, 213 N.E. 2d 257 (1966) and cases there cited. See also in 59 ALR 2d 1938.) The Petitioner had an opportunity to be heard at the disciplinary proceedings and did not deny his conviction; the remaining

evidence related to matters in mitigation. Petitioner in no way claims that his federal conviction was obtained on unconstitutional grounds or that the disciplinary proceedings were erroneous or improper in any way except for his now claimed double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . ." The Petitioner contends that this clause is applicable to the case at bar. Our argument in opposition to this contention is set forth under Roman Numeral II, but we should like to observe that in any event the fact is that Petitioner was not "twice put in jeopardy".

In the case of *Abbate* v. *United States*, 359 U.S. 187 (1959) which concerned a labor dispute, Abbate and Falcone conspired to dynamite facilities of the Southern Bell Telephone and Telegraph Company. Both defendants pleaded guilty to a state charge of conspiring to injure or destroy the property of another and received prison sentences. Subsequently, both men were convicted of a federal charge of conspiring to destroy communication facilities controlled and operated by the United States. The convictions were affirmed by the Court of Appeals and the United States Supreme Court, and it was held that successive trials by two sovereigns were permissible without violation of fundamental constitutional liberties.

Mr. Justice Brennan, who delivered the opinion of the Court, pointed out that to permit the Double Jeopardy Clause to operate as a bar to separate prosecutions by state and federal sovereigns would "bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes." Mr. Justice Brennan further pointed out, at page 198, that:

> ". . . The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be

> harassed by successive trials; that an accused shall not have to marshall the resources and energies necessary for his defense more than once for the same alleged criminal acts. 'The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal of compelling him to live in a continuing state of anxiety and insecurity . . .' *Green* v. *United States*, 355 U.S. 184, 187. In short, 'The prohibition is not against being twice punished, but against being twice put in jeopardy . . .' *United States* v. *Ball*, 163 U.S. 662, 669."

In the case at bar the rule and rationale of *Abbate* is quite applicable; Petitioner was not "twice put in jeopardy" even if it be considered that he was twice punished. Once Petitioner was convicted by the federal sovereign of a crime involving moral turpitude the proceeding by the state sovereign was merely for the purpose of determining the appropriate discipline to be imposed upon a lawyer whose conduct, as evidenced by a conviction of a crime involving moral turpitude, had brought the bench and bar into disrepute.

II.

A STATE DISCIPLINARY ACTION AGAINST AN ATTORNEY IS A CIVIL PROCEEDING

Petitioner contends that disciplinary proceedings against an attorney are "penal" or "criminal" in nature. In support of this contention he cites numerous cases alluded to by this Court in its opinion in the case of *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429 (1963). This Court stated therein that a "State cannot foreclose the exercise of constitutional rights by mere labels." This is a patently sound proposition, and it is clear that many civil actions carry penal aspects. For example, "where punitive, vindictive or exemplary damages may be assessed they are allowed in the interest of society in the nature of punishment and as a warning and example

to deter the defendant and others from committing like offenses in the future . . ." (*Eshelman* v. *Rawalt*, 298 Ill. 192, 131 N.E. 675, 16 A.L.R. 1311 (1921).) In disciplinary proceedings involving attorneys at law the Illinois Supreme Court has recognized that such proceedings have some penal aspects, but the Court has emphasized that the prime function of such proceedings is other than penal in nature. In the case of *People* v. *Meyerovitz*, 278 Ill. 356, 116 N.E. 189 (1917) the Illinois Supreme Court said, at pages 364-365:

> "The disbarment of an attorney is not punishment for crime nor for the purpose of enforcing remedies between parties but to remove a person shown to be unfit for the discharge of the duties of the office and to protect the courts and the public."

Again, in the case of *In Re Borchardt*, 357 Ill. 458, 192 N.E. 383 (1934) the Court said at page 461:

> "This court does not strike the name of an attorney from the roll as a matter of punishment, but does so primarily to protect the public from further misdeeds of like character and to insure the high standing and reputation of the bar."

The rationale is well-stated by the late J. Russell Christianson in 45 Chi. Bar Rec. 57 (1963) in quoting *People* v. *Lamborn*, 2 Ill. 124, N.E. (1834).

> "The office of an attorney and counselor at law is one of great responsibility. To the lawyer is confided the cause of his client, and in the issue of that cause may be involved property, life, liberty and character. It results, then, from the magnitude of the interest committed to him, that he may be the means of much good, or of extensive mischief. When actuated by high and honorable motives, the innocent may with confidence look to him for protection and the injured for redress. But by basely betraying his trust, he becomes a scourge to society, and a stain to a profession everywhere esteemed honorable. Courts of justice ought, therefore, from a just sense of their own honor and integrity, as well as from a regard to the interest of the community,

> to be cautious whom they admit to minister in their temples, and firm in expelling from their portals those whose conduct would pollute the judicial altar."

The social interest which the state seeks to protect in a disciplinary proceeding against a lawyer is thus different from the interest that the federal government seeks to protect in a prosecution for tax evasion. In the former the state is policing its legal profession in order to protect the public, in the latter the federal government is concerned with the raising of revenue. (See: Notes, 45 Cornell Law Quarterly 574, 578 (1959).)* The social interest which is sought to be protected is an important factor to be considered, particularly where the character of the proceeding is ambiguous to the extent that it combines both civil and criminal remedies. (See *Dixon* v. *Alabama State Board of Education*, (5th Cir. 1961) 294 F. 2d 150.) In the case of Application of Gault, 387 U.S. 1 (1967) this Court, quoting with approval from *Kent* v. *United States*, said in regard to juvenile proceedings said at page 30:

> ". . . We do not mean * * * to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even the usual administrative hearing; but we do hold that the hearing must measure up to the essential of due process and fair treatment."

Petitioner's basic argument is that since this Court's decision in *Spevack* v. *Klein*, 385 U.S. 511 (1967), a state disciplinary proceeding against a lawyer must be considered a "criminal case" with the respondent being entitled to all the constitutional privileges of an accused person in a criminal proceeding. We do not so read *Spevack*. This Court held in *Spevack* only that, under the circumstances there existing, the respondent was entitled to invoke the constitutional guarantee against self-incrimination. No-

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* To the extent that the different interests protected would permit a single sovereign to engage in multiple trials as a result of a single act is vigorously objected to by Mr. Justice Brennan in *Abbate*.

where in the opinion does this Court say that a state disciplinary proceeding against a lawyer is a "criminal case." In the later case of *In Re Ruffalo*, 390 U.S. 544, (1968), this Court describes such proceedings as being of "a quasi-criminal nature" and admonishes that the requirements of due process be observed. However, we submit that, contrary to Petitioner's position, this cannot be construed as a holding by this Court that a disciplinary proceeding against a lawyer is a truly "criminal case" to which the Double Jeopardy Clause would be applicable.

Petitioner also cites *Zuckerman*, et al v. *Greason*, 386 U.S. 15 (1967), and *Kaye* v. *Coordinating Committee on Discipline of Association of the Bar of the City of New York*, 386 U.S. 17 (1967). Both of these cases involved the same issue presented in *Spevack*, and in both instances the Court rendered a *Per Curiam* decision remanding the cases for reconsideration in the light of *Spevack*. In *Ruffalo*, cited above by Petitioner, the Association of American Railroads had investigated Ruffalo's handling of claims against the B & O Railroad. The President of the Bar Association, who ordered the charges filed, was also local counsel for the B & O. The original charges included claims that Ruffalo solicited FELA clients through a man named Orlando, an employee of the B & O. Ruffalo testified that Orlando merely investigated FELA cases for him. After this testimony the Ohio Board of Bar Commissioners on Grievances then added a new charge against Ruffalo—that Ruffalo had countenanced and set in motion a scheme whereby Orlando investigated cases for Ruffalo against Orlando's own employer. Ruffalo's motion to strike the new charge was denied, and the disbarment decision was based solely on this latter charge. This procedure against Ruffalo was found by this Court not to comply with the requirements of due process.

In *Ex Parte Wall*, 107 U.S. 265 (1917) this Court held that disciplinary proceedings against lawyers are civil rather than criminal in nature, and we believe this Court has, in effect, affirmed this position in the recent case of *Ungar Ass'n of the Bar of the City of New York*, 389 U.S. 1007 (1967), which was presented to this Court subsequent to the opinion in *Spevack*. Ungar, an attorney and real estate operator in New York City, was convicted of criminal contempt. He had originally testified before a Grand Jury which had granted him immunity. The Grand Jury returned an indictment against Hulan Jack, and Ungar was called as a witness at Jack's trial. Ungar's conduct as a witness at the Jack trial was the basis for Ungar's conviction for criminal contempt.

A disciplinary action was subsequently instituted against Ungar predicated upon the criminal contempt conviction, for aiding and abetting a violation of the conflict of interest statute, and for attempted obstruction of justice. At the conclusion of the proceedings Ungar was disbarred (269 N.Y.S. 2d 163). He unsuccessfully sought to appeal to New York's highest Court (18 N.Y. 2d 690) then petitioned this Court for a Writ of Certiorari. The petition was denied (385 U.S. 1006), shortly before this Court decided *Spevack*.

Following the decision in *Spevack*, Ungar moved to vacate the order of disbarment upon the ground that *Spevack* stood for the proposition that the term "criminal case" as used in the Fifth Amendment to the Federal Constitution encompasses any governmental act which in any sense "punishes" or affects the individual adversely, including a disciplinary proceeding; that the testimony he had given before the Grand Jury had been compelled by a grant of immunity; and that since immunity must be co-extensive with the scope of the privilege, he had been, under his interpretation of *Spevack*, immunized from discipline for any conduct disclosed in his Grand Jury testimony. Conse-

quently, Ungar contended that he should not have been prosecuted for the charges predicated upon a violation of the conflict of interest statute and the attempted obstruction of justice, both of which were the subject of his Grand Jury testimony.

The Appellate Division, First Department, the New York Court having jurisdiction in disciplinary matters, denied Ungar's motion to vacate the order of disbarment, holding that a disciplinary proceeding was not a criminal case and that, consequently, the grant of immunity by the Grand Jury could not immunize him from discipline, (282 N.Y.S 2d 158). New York's highest court denied Ungar's motion for leave to appeal from the order denying his motion to vacate and he petitioned the Supreme Court of the United States for certiorari. The petition was denied on December 11, 1967, 389 U.S. 1007.

We respectfully submit to this Court the illusory nature of the Petitioner's argument. First, after urging the abandonment of "labels", Petitioner proceeds to "label" disciplinary proceedings as "penal", which he equates with "criminal". Having done this, Petitioner then contends that all of the constitutional privileges available to the defendant in a criminal proceeding should be available to a defendant or respondent in a proceeding labelled "penal", all without consideration to the social interest sought to be protected or the essential nature of the proceedings involved.

Second, Petitioner's argument, although superficially plausible, does not bear up under critical examination. By way of example, let us assume an Illinois police officer, under color of state authority, unlawfully invades the privacy of a citizen's home and abuses the citizen and his family. Such conduct could give rise to a disciplinary pro-

ceeding before a police board, a state criminal action or civil action for damages by the citizen, and a possible federal civil rights action. If the conduct were intentionally "fraudulent, malicious, wilful or wanton" the plaintiff in the civil actions would be entitled to exemplary or punitive damages as well as to compensatory damages. (*Eshelman* v. *Rawalt*, 298 Ill. 192, 131 N.E. 675, 16 A.L.R. 1311 (1921); *Aladdin Mfg. Co.* v. *Mantle Lamp Co. of America*, (7th Cir. 1941) 116 F. 2d 708.) All proceedings would be wholly, or to a degree, "penal". If prosecution of any one of the proceedings could be used as a bar to the remaining proceedings judicial chaos would follow and administrative proceedings would, for all practical purposes, have to be abandoned.

We conclude by a brief quotation from this Court's opinion in the case of *In re Isserman*, 345 U.S. 286 (1953) (page 289):

> "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice."

CONCLUSION

It is submitted that Nathan Shavin's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Heretofore appearing as amicus curiae in the Supreme Court of Illinois for the Board of Managers and the Committee on Grievances of the Chicago Bar Association, Sitting as Commissioners of the Supreme Court of Illinois under Illinois Revised Statutes c. 110A § 751 (1967).

APPENDIX I

Illinois Revised Statutes, c. 110A § 751 (1967).

(a) The Board of Governors and its existing Committee on Grievances, and their successors as such, of the Illinois State Bar Association, and the Board of Managers and its existing Committee on Grievances, and their successors as such, of the Chicago Bar Association, are hereby appointed as Commissioners of the Supreme Court and are empowered and charged to make investigations from time to time, as may be necessary, concerning practices of attorneys at law which tend to defeat the administration of justice or to bring the courts and the legal profession into disrepute. To this end, these commissioners are further empowered and charged to receive, entertain, inquire into, and take proof concerning complaints against attorneys at law of this state, and may call to their assistance in such inquiries other members of the bar or bar associations of the state, may make all necessary rules and regulations concerning the conduct of such inquiries, and may themselves, or by such committees as they may designate, take the evidence of witnesses, as hereinafter provided.

(b) No complaint against an attorney at law shall be entertained unless it is signed by the person or persons aggrieved or by the president and secretary of a regularly organized bar association or by the chairman of a regularly appointed committee of the Chicago or Illinois State Bar Associations and unless it is sufficiently clear and specific in its charges as reasonably to inform said attorney at law of the acts of misconduct he is claimed to have committed.

(c) When a member of the bar, designated by the Board of Governors of the Illinois State Bar Association or the Board of Managers of the Chicago Bar Association so to

do, shall file in the office of the clerk of the Supreme Court an affidavit showing that any respondent resides or has gone out of this state or on due inquiry cannot be found, or is concealed within this state, so that process cannot be served upon him, and stating the place of residence of such respondent, if known, or that upon diligent inquiry his place of residence cannot be ascertained, and stating his last known place of residence, the clerk of the Supreme Court shall cause publication to be made in some newspaper of general circulation published in the county of respondent's place of residence or last known place of residence in this state, as set forth in such affidavit, containing notice of the pendency of the proceeding, the names of the complainant and the respondent, the title of this Court and that of the commissioners of the Court (the members of the Board of Governors and Committee on Grievances of the Illinois State Bar Association or of the Board of Managers and the Committee on Grievances of the Chicago Bar Association, as the case may be) and the time and place of the hearing of the case. He shall also within ten days from the first publication of such notice send a copy thereof by mail, addressed to such respondent whose residence or last known place of residence is stated in such affidavit. The certificate of the clerk that he has sent such copy in pursuance of this provision shall be evidence. Such notice shall be published for three consecutive weeks, the first insertion of which shall be at least thirty days before the date upon which the said cause shall be set for hearing by the commissioners; and unless said time has intervened no proceeding therein shall be had, but the said cause shall stand continued to a date at least thirty days after the said first date set for hearing, provided, that in case the respondent appears and consents to the hearing the cause may be heard at an earlier time.

(d) Upon application by such commissioners, or committees, the clerk of the Supreme Court shall issue writs of subpoena ad testificandum, writs of subpoena duces tecum, or dedimus potestatem to take depositions. The commissioners and their committees are empowered to take and transcribe the evidence of witnesses, who shall be sworn by a commissioner or any person authorized by law to administer oaths, and the commissioners shall report to the Supreme Court the failure or refusal of any person to attend and testify in response to any subpoena. The hearings before the commissioners or committees shall be private unless the respondent shall request that they be public.

(e) At the conclusion of a hearing upon any complaint against any attorney before such commissioners or committees, the Board of Governors or Board of Managers, as the case may be, shall, if action by the Supreme Court of any kind is recommended, make report to the Supreme Court of its conclusions of fact and law concerning the complaint, answer, and proof; and thereupon such matters shall stand for hearing and disposition in this Court. Such report shall be entered on the docket and entitled in the name of the respondent. Upon the filing of any such report with proof of service of a copy thereof on the respondent in the same manner as briefs are required by rule of the Supreme Court to be served, the respondent therein shall have ten days from the date of such filing to file exceptions thereto, and shall, within twenty days after the filing of such exceptions, bring to the Supreme Court the record and proofs, or such parts thereof as may be necessary to enable the Court to pass upon such exceptions. The commissioners, upon request of the respondent and payment of the actual cost thereof, shall certify to the Court the proofs and record, or such parts thereof as the respondent may designate. With such record the respondent shall file a printed brief

and designation of excerpt from record or an abstract as provided in rules 341, 342, and 344.

(f) Upon the filing of exceptions to such report by the respondent, the Board of Governors or the Board of Managers, as the case may be, shall designate a member of the bar to file such certificates of proof, additional designation of excerpts or additional abstract, and brief as may be deemed necessary fully to advise the Court. Such additional designation or additional abstract, if any, and brief shall be filed within twenty days after the filing of the respondent's designation or abstract and brief, and respondent may file a reply brief and excerpts from record in 10 days. The number of excerpts or abstracts and briefs and the manner of their duplication and service shall be governed by rule 344.